INDEX.

TABLE OF CONTENTS.

	PAGE
PETITION FOR WRIT OF CERTIORARI	1-22
Statement of Proceedings below	2-15
First Point: As to encroachment by Respondents' garage wall	3-12
Second Point: As to additional encroachment by Iron Railing Fence, across top of wall	12-14
At close of, and after trial of case	14-15
Jurisdiction	15-16
Questions presented for consideration	16-17
Prayer for Writ	17
Appendix "A": Dissenting opinion; filed in Appellate Court below	19-20
Appendix "B": Chart showing overall length of modern automobiles. *This was not introduced in evidence at the trial*	21-22
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	23-65
Majority and dissenting opinions in Appellate Court, below	23
Jurisdiction	24-26
Specification of Errors	26-27
Statement of undisputed facts	27-31
Argument	32-65
Elements that determine an "Easement by Implication"	34-41

PAGE

Relationship of Lessor and Lessee 41-43

Respondents' ownership of Lot No. 801, dates from February 5, 1940 43-44

Maryland Statute Involved 44-47

Respondents, as mere Licensees 47-49

Additional State Court Decisions 49-51

No Proof of Intent to Build over Line, or prior user by common Grantor 51-53

More Decisions, Federal and State Courts 53-59

An Easement shall not be for Profit 59

Respondents' Possession of Lot No. 801, was not constructive notice of being in possession of strip of Lot No. 803 60

Case practically on same point: Clements vs. Sannuti, 51 Atl. 2d (Pa.) 697 61-62

Summary 63-64

Second Point: As to additional encroachment by Iron Railing Fence, across top of wall 64-65

CONCLUSION 65

TABLE OF AUTHORITIES.

Cases.

Adams vs. Marshall, 138 Mass. 228, 234 38-39

Becker vs. Rittenhouse, 297 Pa. 317, 325 ..... 52, 53

Beitel vs. Westmoreland M. Car Co., 91 Pa. Super. 343, 349 50-51

Blauvelt vs. Water Co., 75 N. J. Eq. 351 ..... 5[illegible]

	PAGE
Blight's Lessee vs. Rochester, 20 U. S. 535, 547	42
Brewer vs. Herbert, 30 Md. 301	43
Burnham vs. Nevis, 144 Mass. 88	65
Burns vs. Gallagher, 62 Md. 473	38
Butler vs. Frontier Tel. Co., 186 N. Y. 486	62
Carter vs. Harlan, 6 Md. 20	45, 46, 49, 57
Casey vs. Channing, 43 Pa. Super. 31, 39	58
Clements vs. Sannuti, 51 Atl. 2d (Pa.) 697	61-62
Cook vs. Stearns, 11 Mass. 536	45-46
Dinneen vs. Corporation, 114 Md. 595	33
Donnell vs. Humphreys, 1 Mont. 518, 525, 530	55-56
DuVal vs. Wilmer, 88 Md. 66, 77	33
Ellwood vs. Lannon, 27 Md. 200-207	42
Funk vs. Kincaid, 5 Md. 404-407	42
Gibbons vs. Ebding, 70 Ohio St. 298	65
Goodsell vs. Lawson, 42 Md. 348-371	42
Grafton vs. Moir, 130 N. Y. 465	65
Greenwalt vs. McCardell, 178 Md. 132-136	65
Griffith vs. Morrison, 106 N. Y. 165	39-40
Harris vs. Elliott, 35 U. S. 25, 54	24, 54, 58
Harvey vs. Inhabitants of Sandwich, 256 Mass. 379	56
Hays vs. Richardson, 1 G. & J. (Md.) 383, 384	45, 49
Heffley vs. Lohr, 149 Pa. Super. 586, 591	52
Holland vs. Demarest, 129 N. Y. 676	65
Houston vs. Laffee, 46 N. H. 505, 507	47
Huebschmann vs. Grand Co., 166 Md. 615, 620-621	25

PAGE

Humphreys vs. McKissock, 140 U. S. 304, 314 ..... 24, 54, 55
Isaac vs. Clarke, 2 Gill (Md.) 1 42
Jackson vs. Hathaway, 15 Johns. (N. Y.) 447, 454 ..... 54, 55
Kinsey vs. Drury, 146 Md. 227 43
Landell vs. Hamilton, 175 Pa. 327 50
Leonard vs. White, 7 Mass. 6 55
Littlefield vs. Maxwell, 31 Me. 134, 142, 143 59
Lott vs. Payne, 82 Miss. 218 65
Louis Sachs etc. vs. Ward, 182 Md. 385 65
Maulsby vs. Scarborough, 179 Md. 67-71 42
Mayor, etc. vs. Brack, 175 Md. 615 ..... 26, 45, 46, 47, 48
Moss vs. Chappell, 126 Ga. 199 38
Nauman vs. Tree Box Co., 280 Pa. 97 53
New Orleans Pac. Ry. Co. vs. Parker, 143 U. S. 42, 55 55
Ocean Pier, etc. vs. Woolsey, 4 N. Y. Sup. 114 65
Oliver vs. Hook, 47 Md. 301, 307 40-41
Phillips vs. Phillips, 48 Pa. 178 53
Piccirilli vs. Adams, 27 Northampton (Pa.) 84, 87 53
Post vs. Pearsall, 22 Wend. (N. Y.) 425, 437, 438 49-50
Presstman vs. Silljacks, 52 Md. 647, 656 42
Riden vs. P. B. & W. R. Co., 182 Md. 336, 339-340 25
Riefler vs. Wayne, S. W. P. Co., 232 Pa. 282 58-59
Riggs vs. New Castle, 229 Pa. 490, 493 50
Sachs etc., Louis vs. Ward, 182 Md. 385 65
Saxton vs. Mitchell, 78 Pa. 479, 483 50
Scheide vs. Porstmann, 66 Fed. Sup. 483, 487 53-54

PAGE

Shipley vs. Fink, 102 Md. 219-226 ..... 44, 45, 48, 60

Sizer vs. Quinlan, 82 Wis. 390 65

Slear vs. Jankiewicz, 54 Atl. 2d (Md.) 137-141 23

Slegel vs. Lauer, 148 Pa. 236, 240 ..... 49, 59

St. John etc. vs Gengor, 121 N. J. Eq. 349, 354 26

Stein vs. Telephone Co., 301 Pa. 107, 111 ..... 53, 58

Strausburg vs. Sidwal Realty Co., 19 Northampton (Pa.) 268, 270 40

Sutton vs. Groll, 42 N. J. Eq. 213 65

Tabor vs. Bradley, 18 N. Y. 109, 111-112 56-57

Tizer vs. Tizer, 162 Md. 489-494 42

Union Falls Power Co. vs. Marinette Co., 238 Wis. 134, 139 57-58

United States vs. Causby, 66 Sup. Ct. 1062, 1067 62

Warren vs. Blake, 54 Me. 276 39

Watson vs. French, 112 Me. 371 65

Wessels vs. Colebank, 174 Ill. 618, 622 49

Weyler vs. Gibson, 110 Md. 636, 653 ..... 25, 65

Whyte vs. Builders League, 164 N. Y. 429, 433 40

Wisconsin vs. Illinois, 278 U. S. 367, 399 26

Woodhull vs. Rosenthal, 61 N. Y. 382 55

Statutes.

Judicial Code, Sect. 237 (b), as amended by Act of February 13, 1925, 43 Stat. 937, Tit. 28, Sect. 344 (b), U. S. C. A. 15, 24

Article 21, Sect. 1, Code of Pub. Gen. Laws of Maryland, (1939 Ed.) 44, 47

Other Authorities.

	PAGE
Amer. Juris., Vol. 32, pp. 163, 164	54
Bouvier's Law Dictionary	54
Corpus Juris Sec., Vol. 6, pp. 133, 134, 136	54
Frank, on Title, (Maryland, 1912), p. 94	38, 41
Gale, on Easements, p. 23	37
Jones, on Easements, Sect. 14	37
Jones, on Easements, Sect. 20	38
L. R. A. (n. s.) Vol. 11, pp. 398, 407	38
Restatement, Property, Sect. 450 (p. 2901)	34
Restatement, Property, Sect. 450 (p. 2903)	34
Restatement, Property, Sect. 471 (pp. 2964-2965)	35
Restatement, Property, Sect. 471 (pp. 2965-2966)	35
Restatement, Property, Sect. 476 (pp. 2977-2978)	35-37
Ruling Case Law, Vol. 9, pp. 754, 757	52
Ruling Case Law, Vol. 9, pp. 784, 785	65
Ruling Case Law, Vol. 9, p. 790	64
Ruling Case Law, Vol. 9, pp. 796, 797	65
Tiffany, Land & Ten., Vol. 1, p. 816	54
Tiffany, Real Prop., Vol. 2, Sect. 293	38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

LENA JANKIEWICZ and
AMELIA JANKIEWICZ POREMSKI,
formerly known as Amelia Jankiewicz,
Petitioners herein,

vs.

EUGENE B. SLEAR and MADELEINE D. SLEAR,
his wife,
Respondents herein.

PETITION OF LENA JANKIEWICZ et al., FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE JUSTICES OF THE COURT:

Lena Jankiewicz and Amelia Jankiewicz Poremski, formerly known as Amelia Jankiewicz, hereby respectfully petition this Honorable Court, to direct that the Writ of Certiorari be issued in this case, to the Court of Appeals of Maryland, the Court of last resort of the State of Maryland, in order that a judgment entered in said Court may be reviewed.

A Motion for reargument was filed by your Petitioners, but it was denied, on October 7, 1947. Wherefore, the judgment of said Appellate Court shall be a final and con-

clusive judgment in this case unless reversed by this Honorable Court; and your Petitioners, therefore, respectfully show:

STATEMENT OF THE PROCEEDINGS BELOW.

1. An original action, was begun by your Petitioners, private persons, as Plaintiffs, on September 5, 1945, in the Court of Common Pleas of Baltimore City, of competent jurisdiction, by filing a Declaration (subsequently amended) at law, of ejectment, to recover full possession of a parcel of land, private property, which the Plaintiffs had purchased, as a leasehold for a term of years, from The James Keelty Realty Corporation, on May 23, 1941, by deed duly executed unto them, delivered and recorded, which conveyed the whole parcel (subject only to the annual ground rent of $90.00, aforesaid, issuing out of said premises), correctly described by metes and bounds, as alleged in the amended Declaration, which land then was and still is improved on its front by a two-story, brick, row-house, dwelling, 20 feet in width, being lot No. 803 N. Augusta Avenue, Baltimore, Maryland. The entire lot is 90 feet in depth. The portion particularly involved is in the rear of the dwelling house and consists of an open yard, and extends easterly from the outside of the back wall of the dwelling, a distance of about 30 feet, to a 15 foot alley, which entire lot and premises, including the whole width of the entirely open rear yard, is claimed by the Plaintiffs for their sole and exclusive use, possession, and occupation, subject only to the aforesaid ground rent. The dwelling house is erected entirely within the correct boundary lines of that lot, as to which there is no dispute.

2. The suit was docketed against Eugene B. Slear and Madeleine D. Slear, his wife, also private persons, the herein Respondents, as the Defendants, alleged then to be, and

since are, in wrongful possession of part of Petitioners' said lot of ground. A plea, the general issue, of "not guilty", was interposed, under which, at the trial, Respondents admitted the existence of the encroachment, but set up an alleged justification, claiming the Plaintiffs and the Defendants, had acquired their respective, adjoining property, from The James Keelty Realty Corporation, a common source, and were by implication granted an easement to exclusively occupy the part of Petitioners' lot, in the rear thereof, upon which it is admitted the rear wall of Respondents' garage extends over and covers.

3. The evidence introduced at the trial shows the rear end wall of a one-story concrete block garage, erected lengthwise across the certain lot No. 801 belonging to the Respondents herein (original Defendants below), is built across the line and encroaches upon your Petitioners' adjoining lot, No. 803, and covers a strip of land, 8¾" to 10¾" in width and 13' in length; and also that an iron railing fence, 3 feet high, of the Respondents, erected over the top of that encroaching wall, itself is a further encroachment, whereby your Petitioners are completely excluded from all use, or occupation, or possession, of that much of their land and otherwise interferes with their freedom of exercise of lawful rights upon their property.

First Point.

As to the Encroachment by Respondents' Garage Wall.

4. The lot of ground referred to above as No. 803, is the lot secondly shown, on a plat dated "3-4-40", introduced in evidence at the trial, by the Petitioners, and marked their Exhibit No. 2 (Appellees' App. pp. 9-10; pp. 27-29); and the lot of ground, Respondents', No. 801, is the lot firstly shown on said plat as "#801". On its rear, there

is a garage the rear wall of which encroaches over the line northerly, and upon Petitioners' lot No. 803.

Respondents' said lot No. 801 and Petitioners' said lot No. 803, both as shown on said plat, are the first two of a row, of 11 adjoining lots of ground, all fronting on Augusta Avenue, and extending easterly 90 feet to a 15 foot alley, the entire row extending from Cranston Avenue northerly to Woodridge Avenue, a total distance of 225 feet. Lot No. 801 is the lower corner lot, which binds easterly 90′ along the north side of Cranston Avenue, and is of an even width of 20′ 6″. Lot No. 821 is the upper corner lot and it binds also easterly along the south side of Woodridge Avenue, and is of an even width of 24′ 6″. All other lots, Nos. 803 to 819, inclusive, are inside lots, and each fronts on Augusta Avenue, and each has an even width of 20 feet. All 11 lots run easterly and their rears bind along the west side of the 15 foot alley.

5. The tract of land, upon which the development, platted into the 11 separate and adjoining lots, as shown on the said Exhibit No. 2, became vested in James Keelty, Inc., a bona fide domestic Maryland corporation, in fee simple, on June 27, 1931 (See Plaintiffs' Exhibit No. 1, Appellees' App. pp. 6-8). Operations to build a row of adjoining, two-story brick dwelling houses, on those lots had been or were started but shortly thereafter ceased. Such operations were again resumed, in the latter part of 1939, and carried on by The James Keelty Realty Corporation, another bona fide, domestic Maryland Corporation, which then was undertaking to build the houses and sell them to the public, on a strictly leasehold basis, each house to be an individual, separate property (although immediately adjoining) and be sold at the market price; and to be subject to an annual ground rent of $90.00. All of the reversions were to be

held by James Keelty, Inc., in fee simple, which would collect all the rents issuing thereout under the terms of a lease, for 99 years, renewable forever, from James Keelty, Inc., to The James Keelty Realty Corporation, formally executed, delivered and duly recorded on August 29, 1940 (Plaintiffs' Exhibit No. 3; Appellees' App. pp. 11-15). In the interim The James Keelty Realty Corporation had actual possession of the entire 11 lots, as the leaseholder.

6. The evidence showed that the Respondents originally contracted to purchase their lot, as a leasehold, from The James Keelty Realty Corporation, on February 5, 1940 (Deft's. Ex. No. 1; Appellees' App. pp. 52-53). The dwelling house thereon to be known as No. 801 N. Augusta Avenue apparently was not completed, but its building and lot size had been set by its foundation and side walls. At that time, too, a completely built one-story garage was attached to the rear of the dwelling house. That garage then stood entirely upon said lot No. 801, within its established boundary lines. It fronted and had its entrance on Cranston Avenue, and extended northerly therefrom parallel to, and ran with, the rear wall of the dwelling house but not across the entire lot. Later, as it is now claimed, that garage was found too short to accommodate the Respondents' automobile.

7. Neither the Respondents, nor their called witness, James Keelty, Jr., could state the actual length (exterior or interior) of that original garage on lot No. 801 on February 5, 1940, or the distance Defendants desired it to be lengthened for additional interior garage space.

8. The James Keelty Realty Corporation, solely for the accommodation of the Respondents' automobile, agreed to and did lengthen that garage, after February 5, 1940. It was done at no additional cost or expense to the Defen-

dants. The workman was in the employ of The James Keelty Realty Corporation.

9. The lengthening of the Respondents' garage was finished about April 1, 1940. Its alteration was not initiated by, or for the use of, or ever used by, The James Keelty Realty Corporation at any time. Use of the enlarged garage was possible only after May 15, 1940, after Respondents had been placed in actual possession. Respondents then believed the garage as lengthened for them was within the established lines of the lot No. 801, they had previously contracted to buy. They never requested, nor paid for, any additional land to increase the width of the original lot. They merely desired a longer garage; which could have been built within the established lines of lot No. 801, the metes and bounds of the lot, the Respondents had contracted to purchase, as the same were fixed, on February 5, 1940.

10. On May 15, 1940, the Respondents entered into active use and exclusive possession of the lot No. 801 and the entire garage as extended. But they had never been advised, then did not know, and particularly on April 24, 1941, or May 23, 1941, had not discovered that their garage end-wall had been occupying a strip of land of the adjoining lot No. 803. Mr. Slear testified that he is a construction engineer and familiar with building operations. It is an obvious inference, that as he did not have knowledge of the encroachment on April 24, 1941, he could not, on that day, extend any knowledge or advice, to a purchaser of No. 803 that he was in partial possession of the rear of lot No. 803.

11. After the dwelling-house, on No. 801, had been made ready for occupancy, on May 15, 1940, and that lot was delivered into the actual possession of the Respondents,

as the evidence and the inferences drawn therefrom show, The James Keelty Realty Corporation and the Respondents looked upon that property as being the identical lot of ground and the improvement thereupon (even after the garage had been lengthened) as was covered by the contract, dated February 5, 1940. Both The James Keelty Realty Corporation and the Respondents claim not having any actual knowledge, that in the lengthening of the garage on lot No. 801, on April 1, 1940, the workman had extended the rear wall beyond the boundary line, and upon the strip of land of the adjoining lot No. 803, 8¾" at the wall's westerly end, and 10¾" at its easterly end, for the wall's length of 13 feet, of a height of 6-7 feet of concrete block, 8" in thickness, which strip of land, of said lot No. 803, as covered by the wall, is now possessed by the Respondents exclusively, and adversely to the Petitioners.

12. Neither the Respondents nor The James Keelty Realty Corporation, had any knowledge whatsoever after April 1, 1940, that the strip of land of lot No. 803 was covered by the Respondents' garage's rear-wall extending from No. 801, until the encroachment was subsequently discovered by the Petitioners in the year 1945. Then the latter called the defect to the attention of The James Keelty Realty Corporation.

13. The garage's rear wall, of No. 801 as altered, was encroaching over the line and covering the strip of land on the south side of the yard of lot No. 803 at the time your Petitioner personally inspected No. 803 prior to the execution of a contract of sale to purchase No. 803, on April 24, 1941, and likewise when your Petitioner accepted the actual conveyance of the property No. 803, by deed on May 23, 1941. At that time The James Keelty Realty Corporation, the seller and grantor of the property, did not know of said encroachment. Therefore, neither it nor its selling

agent could have called the defect to the Petitioners' attention. Ready notice of it was not clearly observable to your Petitioner when she inspected the property on April 24, 1941. The rears of the two lots, where they adjoin, to be observed on the photographs filed in evidence, were in that same condition on April 24, 1941, and May 23, 1941, when the Petitioners purchased said No. 803, as a brand new property, never before occupied.

As respects the actual conveyance of lot No. 801 and lot No. 803, the deed conveying No. 803 to Petitioners, on May 23, 1941, was the first actual conveyance. That deed is in the evidence and marked Plffs. Ex. No. 4; Appellees' App. pp. 17-18; and the deed to actually convey No. 801 to Respondents, on July 9, 1941, is also in evidence, and marked Plffs. Ex. No. 5; Appellees' App. pp. 20-22. At this point Petitioners desire to emphasize that the grantor, in each conveyance, described the line to mark the southern boundary line of No. 803, and to mark the northern boundary line of No. 801, which in operation is the common boundary line between those two lots, and in each deed, respectively, that dividing line is described as *"running thence * * * parallel with Cranston Avenue to and through the center of the partition wall ninety feet to the west side of an alley fifteen feet wide * * *."* Hence Cranston Avenue is designated as the fixed *"monument"* chosen to determine the true and proper course of that line, and the plat in evidence, marked Plffs. Ex. No. 2, and also the Survey, marked Plffs. Ex. No. 8; Appellees' App. pp. 9-10 and App. pp. 30-31, show that *Cranston Avenue runs easterly and westerly, in a directly straight line.* And there is no mention whatsoever, in either deed, that a garage is on lot No. 801 to be conveyed under that deed, or making any references of reservations whatsoever, in either deed, to a garage.

14. Thereafter, on July 9, 1941, the Respondents' pending contract to purchase the property No. 801 was consummated by their payment of the balance of the purchase price. Thereupon a deed for that property was executed by The James Keelty Realty Corporation to the Respondents and delivered to be recorded, to convey the leasehold estate therein, subject to an annual ground rent of $90.00. The common grantor of both No. 801 and No. 803, the Petitioners, and the Respondents, did not then know that the garage wall of No. 801 extended over and upon No. 803.

Mr. Slear, in his testimony, stated *he did not know about the property line; he said he knew that the north wall of the garage was moved, but he did not know it was moved over on the adjoining lot, and did not know it when he purchased his property* (Appellees' App. p. 9).

The wall creating the encroachment was moved on April 1, 1940, after the signing of the contract of sale dated February 5, 1940, so it is an obvious inference that he was referring to July 9, 1941, as the date establishing his completed purchase. Your Petitioners' purchase was on May 23, 1941, and preceded Mr. Slear's consummation of his Contract, of February 5, 1940.

15. The discovery of the encroachment by your Petitioners occurred early in 1945. A land survey was then made and the encroachment was made manifest and then reported to The James Keelty Realty Corporation, the grantor of the leasehold, and also to Nora L. Keelty, then the holder of the reversion, in both 801 and 803. That constituted the first knowledge by any party in interest, that the rear wall of the garage of No. 801 extended over upon No. 803.

16. Further notice was given by letter, from your Petitioners' counsel to The James Keelty Realty Corporation

and also to the Respondents, on June 18, 1945, and as a result Respondents referred the letter to The James Keelty Realty Corporation and the latter referred the matter to its attorney. Thereafter several conferences were had between counsel in order to complete negotiations for the removal of the encroachment of the offending wall from your Petitioners' lot. The Respondents employed separate counsel and the latter conferred frequently with your Petitioners' attorney. Respondents never made, during any of those conferences, directly or indirectly, any claim to have been given an alleged easement by implication to use the land of lot No. 803 to support the garage wall extending over from No. 801 and your Petitioners at all times insisted that the wall should be removed off their lot. Your Petitioners were led to believe the wall would be removed, but its removal was being delayed.

17. After the institution of the suit, and pending subsequent discussions, Respondents' counsel delayed pleading to the amended Declaration and that resulted in a letter of reminder being sent from your Petitioners' attorney to Respondents' counsel, dated October 26, 1945, introduced in evidence (Plaintiffs' Ex. No. 18; Appellees' App. p. 49) to which Respondents' counsel replied, under date of October 27, 1945, in part, in the following manner:

> "* * *
>
> "It is to be regretted that our efforts to reach an amicable adjustment of this dispute were not successful.
>
> I am going to suggest to Mr. Slear that he employ a surveyor to carefully mark the boundary lines and then arrange with Mr. Keelty, or some other contractor to remove that part of the garage which encroaches on the Jankiewicz lot."

The above is emphasis that no claim of easement by implication was then being considered. That letter was in-

troduced into the evidence and is marked Plaintiffs' Ex. No. 19; Appellees' App. p. 50.

18. A copy of the Survey showing the details of both lots, Nos. 801 and 803, was furnished to the Respondents' counsel and the correct boundary line between the two properties was set forth thereon, and the same was indicated to Respondents' counsel and thereafter the Respondents and The James Keelty Realty Corporation entered into negotiations, intent upon having the garage wall removed, however they failed to carry them through, but all during these negotiations there never was any claim on the part of the Respondents that an alleged easement by implication was being claimed by them to exist in their favor upon the land of lot No. 803 as to permit the extension of their garage wall over the line. Such a claim came as an after-thought and was first expressed immediately before the trial of the case, on November 1, 1946.

19. Mr. Slear, as a witness on his own behalf, testified in substance, that he then had a Plymouth car, and it would fit into a garage if erected entirely on lot No. 801, which is 20′ 6″ wide (Appellees' App. p. 61).

The entire overall extreme length of such a modern Plymouth car, is 16′ 4″. The exterior length of a garage, if erected entirely on lot No. 801, would be 20′ 6″ and therefrom deducting one foot four inches—8″ for a front entrance and 8″ for a back wall—would provide a garage with a net inside length of 19′ 2″. Hence there would be excess clearance beyond the automobile's end of nearly 3 feet. Most modern expensive luxury automobiles do not require interior space in excess of 19′ 2″ inside length. Only two very expensive automobiles are of the length of 19′ 7″ to require a garage of slightly greater length.

It is, therefore, impossible to conclude in what possible or probable way the present garage on lot No. 801, which aided by its encroachment upon lot No. 803 affords an inside length of about 19′ 10″, could be an actual or strict "necessity." Mr. Slear's Plymouth car (length 16′ 4″) would go into the (19′ 2″) garage if the wall was moved back to the line on his property.

SECOND POINT.

As Respects the Particular Encroachment by the Iron Railing.

20. An iron railing is erected as a fence 3 feet high, embedded into the concrete slab covering the top of the garage wall encroaching on lot No. 803, and runs east to west, in a straight line, directly across above the top of the garage wall, on Petitioners' side of the property division line, for the entire width of the wall of 13 feet at approximately 5 inches north of the lot line (See Survey; Plffs. Ex. 8; Appellees' App. pp. 30-32 and see Photos. Plffs. Ex. 23; Dfs. App. pp. 19-20) which railing at its westerly end is permanently inserted deeply, at two places (for its upper and lower rails) into the bricks and mortar, of the first floor, rear wall, of Petitioners' dwelling house No. 803, which places are directly under the bend of the down-spout, over the garage wall, and entirely on Petitioners' property (See Photos; Plffs. Ex. 22, 23; Dfs. App. pp. 17-18, 19-20).

21. The above insertions of the iron rails, into the rear wall of Petitioners' house, have damaged that wall in at least those two places, and also particularly deprives the Petitioners of their free and lawful exercise of their rights to use, enjoy, occupy, and improve their property at the places indicated and in the occupancy of the space above, and upon the strip of their land, upon which Respondents'

offending wall is erected, and which, in the meantime, have prevented Petitioners from freely using necessary proper and safe means, devices and instruments to gain access to the upper part of the rear house-wall, down-spout and rain-water gutter overhead, from the roof of their house downward, in order to make inspections of and to effect needed repairs and replacements to the overhead rain-water gutter and the down-spout, now badly in need of repair, for that the said iron railing, operating as a fence, completely excludes Petitioners from entering upon the space upon which it is erected upon Petitioners' lot, and they are also deprived from the right of extending the rear of their property, even to the extent that the Respondents have improved their property.

22. The said iron railing, as presently erected, does not in any way serve to provide interior garage space of "strict necessity" in order to house or accommodate Petitioners' automobile, within the garage's interior. The railing is attached to the garage's exterior, over the top of the garage's rear wall, and within the space thereof the wall encroaches across the dividing line, and upon Petitioners' lot, north of the division line and it is entirely within the bounds of Petitioners' lot. Said railing or fence, for all purposes of enclosure beneficial to safety of the Respondents, just as easily and as effectively, can be erected into the top of the garage, where it may be within the bounds of Respondents' lot. Said iron railing as it is now permanently embedded into Petitioners' property, is to their detriment and damage, and is definitely not within the purview of "necessity" to Respondents, in respect to the housing of their automobile, but is a separate trespass and a continuing nuisance as fully as if it were embedded directly into the soil of the strip of Petitioners' land itself.

As presently erected the railing serves to create only a wider rear porch, beyond the wall of Respondents' lot and that cannot be deemed a "necessity," for it extends beyond the width of the 20′ 6″ lot they originally purchased under the contract, on February 5, 1940.

At the Close of, and After the Trial of the Case.

23. After the close of the trial on the merits before the Court, without a jury, by stipulation of the parties, on November 1, 1946, and concluded on the same day, in accordance with Rule 9, of the Rules of Practice and Procedure approved by the Court of Appeals of Maryland, a certified copy of which rule is filed with the Record in this case, for the information and guidance of this Honorable Court, and upon the facts contained in the two printed Appendices and the inferences to be drawn therefrom, the trial Court entered a judgment in favor of the Plaintiffs (your Petitioners herein) for the possession of the land described in the amended Declaration and $104.90 damages, (recompense for part of the expenses incurred was requested; no other damages were claimed), and costs. That Court's opinion is in writing and made a part of the Record of the case (Appellants' App. pp. 25-26).

24. Thereafter, on January 23, 1947, Respondents entered an appeal to the Court of Appeals in Maryland, and prosecuted the same, and on July 8, 1947, that Court reversed the judgment of the trial Court, with costs to the Appellants. That decision was not unanimous. Six judges heard the appeal, five favored the reversal, but one, the Chief Judge of the Court, dissented in favor of affirming the judgment of the trial Court. Both opinions were written and filed and the case was reported (54 Atl. 2d p. 137, etc.). Certified copies of both opinions are filed with the Record, in these proceedings.

25. Petitioners cite to your Honor's attention, the entire dissenting opinion of the Chief Judge of the Court of Appeals of Maryland, and pray that it may be taken and considered as a part of this petition, as fully as if set forth at large herein. A transcript thereof is annexed as an Appendix "A" to this Petition.

26. A Motion for Reargument was duly filed in the proceedings, on August 5, 1947, and considered, but was denied on Ocotber 7, 1947. The Court of Appeals of Maryland, is the Court of last resort of said State and its judgment, under the majority opinion, is final and conclusive of the subject matter of the case, within the State of Maryland.

27. The Petitioners, with due and humble respect for the opinions of the learned Judges of the Appellate Court below, who concurred in the aforegoing reversal, nonethe-less aver that the action so taken by the Court, in reversing the previous judgment of the trial Court amounts to affirmative action by the judicial branch of the Government of the State of Maryland, taking private property, from private persons, and awarding it to other private persons, for strictly private use, without the consent of its owner, and is "without due process of law," and in violation of Article 23 of the Declaration of Rights of the State of Maryland, and also contrary to Section 1, of the 14th Amendment to the Constitution of the United States.

JURISDICTION.

The jurisdiction of this Honorable Court, in the premises, is invoked under Judicial Code, Sect. 237(b), as amended by Act of February 13, 1925, 43 Stat. 937, Tit. 28, Sect. 344(b), U. S. C. A.

This Honorable Court is sought to accept jurisdiction of the premises, that the judgment of the Court of Appeals of Maryland may be reviewed, and that the previous judgment of the trial Court may be affirmed. For that, upon the hereinabove stated facts the Respondents, having had the sole and exclusive, private, enclosed, and dominant use, of Petitioners' strip of land, since 1940, twenty years of such continuous adverse possession, may by prescription give the Respondents the absolute ownership of said property, without your Petitioners' consent and without compensation.

QUESTIONS PRESENTED TO THIS HONORABLE COURT FOR CONSIDERATION.

1. Whether, the action of the Court of Appeals of Maryland, below, in impressing an "easement by implication" upon the strip of land of your Petitioners, in favor of the adjoining land and garage thereon of the Respondents, to give the Respondents a permanent, exclusive, continuous and dominent use of your Petitioners' property, is a result of an erroneous construction of the doctrine of "easements by implication".

2. Whether, the decision of the Court of Appeals of Maryland, below, is in harmony with the prevailing doctrine of "easements by implication" is respect to adjoining land, as recorded in the decisions of this Honorable Court, and of the Courts of the several States, including Maryland, pertaining to the same subject-matter.

3. Whether, the judgment of the Court of Appeals of Maryland, below, constitutes affirmative action on the part of the Judicial branch of the Government of the State of Maryland as, in law, amounts to awarding private property of private persons, gratuitously, to other private persons, for the latter's strictly private use, without the owner's

consent, as thereby to permanently, continuously, and adversely deprive the real owners of their private land, in violation of Sect. 1, of the 14th Amendment to the Constitution of the United States.

WHEREFORE, your Petitioners pray that the Writ of Certiorari may be issued in this case, by this Honorable Court and directed to the Court of Appeals of the State of Maryland, commanding that Court to certify and send to this Honorable Court, for review and determination, a full and complete transcript of the record and proceedings had before the Court in the case numbered and entitled on its docket, as: "Eugene B. Slear and Madeleine D. Slear, his wife, Appellants versus Lena Jankiewicz and Amelia Jankiewicz Poremski, formerly known as Amelia Jankiewicz, Appellees, Appeal No. 133, October Term, 1946," to the end that the judgment of the said Court of Appeals of Maryland below, entered therein, may be reversed by this Honorable Court, with direction to affirm the judgment of the trial Court first appealed from; and that your Petitioners may have such further and other relief in the premises as to this Honorable Court may seem just and proper.

And your Petitioners will every pray, etc.

JOSEPH J. REHM,
Attorney for Petitioners,
20 East Lexington Street,
Baltimore 2, Maryland.

APPENDIX TO PETITION "A".

DISSENTING OPINION BY MARBURY, CH. J.

I am unable to agree with the holding of the majority of the court in this case that the use of the land occupied by the garage wall was "strictly necessary" for the enjoyment of the corner property. "Necessity" is a word of much greater implication than "convenience", and it has generally been so construed. Ways of necessity over lands of others have been denied many times, because other means of ingress and egress are available. It is just as desirable to be able to get out of property by the most convenient method as it is to be able to house a car in the most convenient place. Yet in rights of way cases "convenient" has not been construed as meaning "necessary". I am at a loss to understand why it should be so construed here.

The construction of the garage where it was placed was clearly a mistake. No one thought it was over the line. If a boundary between two properties is erroneously conceived to be at a certain place, the owner who thereby gets additional ground does not get title to it, even if he thus retains it for more than twenty years. It is held that his possession is not adverse because he did not intend to take a part of his neighbor's land. See Cresap vs. Hutson, 9 Gill, at p. 27, Davis vs. Furlow, 27 Md. 536, and Hiss vs. McCabe, 45 Md. 77, in which the body of the opinion is just the opposite of the syllabus. We are now giving the appellant land which does not belong to him, which he did not know he was occupying, which he had never consciously claimed, and of which he has had possession for only seven years. This is done on the theory of an implied grant or reservation, which, under our decision, quoted in the majority opinion, arises "only in cases of the strictest necessity, and where it would not be reasonable to suppose that

the parties intended to the contrary". How can it be held here, either that there is strict necessity, or that the parties intended to place the garage partly on the wrong lot? This extension of the doctrine of implied grant or reservation has so many possible implications that it should not be adopted by this Court. I think the judgment should be affirmed.

Pages 21-22

ARCHITECTURAL ENGINEERING

TIME-SAVER STANDARDS

CRITICAL CLEARANCE DIMENSIONS OF AUTOMOBILES

Data Developed by Urban Land Institute, Washington, D. C., courtesy URBAN LAND

Recent trend in automobile design has been toward longer, wider, and lower cars which reflect the streamlining of super-highway design but not the limitations of terminal facilities. The accompanying table gives critical dimensions of most of the popular makes

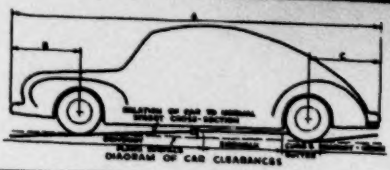

DIAGRAM OF CAR CLEARANCES

Name	A	B	C	D			
	Overall Length (Feet)	OVERHANG: Ctr. Front Wheel to Front Bumper (Feet)	OVERHANG: Ctr. Rear Wheel to Rear Bumper (Feet)	GROUND CLEARANCE: Ground to Lowest Point (Inches)	GROUND CLEARANCE: Location of Lowest Point	Turning Circle Average (Feet)	Overall Width (Feet)
1946 Chrysler —							
Crown Imperial — 8 cyl.	19.6	3.6	3.8	7.0	Muffler	48.2	6.3
Imperial — 8 cyl.	17.9	3.5	3.8	6.8	"	41.6	6.3
Royal — 6 cyl.	17.4	3.5	3.8	6.5	"	40.7	6.3
Royal — 6 cyl., 7 passenger	18.9	3.4	3.8	6.8	"	43.0	6.3
Dekota	17.3	3.3	4.0	6.5	"	40.5	6.3
De Soto 9 passenger	18.8	3.2	4.0	6.8	"	43.0	6.3
De Soto	17.1	3.1	4.0	6.5	"	40.2	6.3
Dodge 9 passenger	18.8	3.1	4.0	6.8	"	43.0	6.3
Plymouth	16.4	2.8	3.8	6.5	"	39.3	6.1
1946 Buick — "40"	17.3	3.0	4.2	6.0	Transverse Bracket	42.7	6.3
Buick — "50"	17.7	3.1	4.3	5.9	"	44.2	6.4
Buick — "70"	18.1	3.0	4.3	6.1	Exhaust Pipe	45.6	6.6
Cadillac 60S	18.7	3.0	4.6	6.3	Rear Spring	48.3	6.7
Cadillac 61	17.8	2.9	4.4	6.4	"	45.7	6.7
Cadillac 62	18.3	3.0	4.6	6.4	"	33.8	6.7
Cadillac 75	18.9	2.9	4.7	5.8	"	40.8	6.9
Chevrolet — St. Master	16.6	2.8	4.1	7.3	"	42.3	6.1
Chevrolet — Fl. Master	16.6	2.8	4.1	7.4	"	42.4	6.1
Oldsmobile 66	17.0	3.0	4.1	7.2	Rear Stabilizer Bracket	41.9	6.3
Oldsmobile 76	17.7	3.0	4.4	7.1	Frame X Member	42.6	6.3
Oldsmobile 78	17.7	3.0	4.4	6.9	"	43.9	6.3
Oldsmobile 98	18.0	3.0	4.5	7.1	"	44.0	6.3
Pontiac 22	17.0	3.0	4.2	7.7	Frame Center	42.6	6.3
Pontiac 26	17.5	3.0	4.4	7.3	"	43.7	6.4
Pontiac 27	17.0	3.0	4.2	7.7	"	42.6	6.3
Pontiac 30	17.5	3.0	4.5	6.3	Splash Pan	41.7	6.4
1946 Studebaker —	18.2	3.2	4.5	6.8	Center X Member	44.5	6.5
Hupmobile	16.9	3.0	4.0	7.5	Center of Axle Beam	41.0	6.1
Ford	16.5	3.0	4.2	9.5	Center of Axle I Beam	41.0	6.1
1947 Studebaker —							
16A — Long Commander	17.4	3.3	3.8	6.1	Muffler Bracket	42.9	5.8
14A — Commander	17.0	3.3	3.8	6.1	"	42.0	5.8
60 — Champion	16.0	2.9	3.8	5.9	Exhaust Pipe Bracket	42.9	5.8
1946 Nash —							
Ambassador 6	17.4	2.8	4.0	8.0	Exhaust Pipe (32" Back of Front Wheel)	38.0	6.3
Nash "600"	16.6	2.8	4.0	9.0	Muffler (46" Back of Front Wheel)		
1946 Packard — 2100-1-11	17.4	3.2	4.3	6.7	Muffler	41.0	6.3
2105-6	18.0	3.2	4.3	6.9	"	42.0	6.3
2136	19.7	3.2	4.3	.....	.....	44.0	6.3
						33.0	6.3
1947 — Kaiser and Frazer	16.9	2.8	3.8	7.1	Rear Axle	44.0	6.1

Base data furnished by the Chrysler, General Motors, Ford, Nash, Studebaker, Packard, and Kaiser-Frazer Corporations.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

LENA JANKIEWICZ and
AMELIA JANKIEWICZ POREMSKI,
formerly known as Amelia Jankiewicz,
Petitioners herein,

vs.

EUGENE B. SLEAR and MADELEINE D. SLEAR,
his wife,
Respondents herein.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURT BELOW.

Both the majority opinion of the Court of Appeals of Maryland, in the case of the appeal below of Eugene B. Slear, et ux, Appellants, vs. Lena Jankiewicz, et al., Appellees, and the dissenting minority opinion, in said case, appear in the Record filed in these proceedings. The case has been fully reported, in 54 Atl. 2d, pp. 137-141.

JURISDICTION.

(and some authorities)

The jurisdiction of this Honorable Court, in the premises, is sought to be invoked, in this case, under Judicial Code, Sect. 237 (b), as amended by Act of February 13, 1925, 43 Stat. 937, Tit. 28, Sect. 344 (b), U. S. C. A., to set aside a judicial judgment, entered in the Court of Appeals of Maryland, on October 7, 1947, which your Petitioners believe to be unconstitutional. Such a judgment would hold, in effect, that a strip of private land of your Petitioners, shall be forever subject to an easement of appurtenance, and give Respondents, the owners of the adjoining separate parcel of private land, a permanent and dominant use of your Petitioners' said strip of land without their consent, and amount to depriving your Petitioners of their property without due process of law and is in violation of Sect. 1, of the 14th Amendment to the Constitution of the United States, according to the following authorities:

In *Harris vs. Elliott,* 35 U. S. (10 Peters) 25, a leading case on the subject; on p. 54, it is said:

> "* * * It would be absurd to allow the fee in one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries."
>
> *"According to this rule land cannot be appurtenant to land."* (Italics supplied.)

In *Humphreys vs. McKissock,* 140 U. S. 304; on p. 314, it is said:

> "Of two parcels of land one can never be appurtenant to the other, for although the possession of the one may add greatly to the benefit derived from the other or essential to the possession of its title or use; one can be enjoyed independently of the other."

In *Weyler vs. Gibson*, 110 Md. 636; on p. 653, it is said:

> "Speaking of this Amendment Judge Dillon says: 'It was of set purpose that its prohibitions were directed to any and every form and mode of State action—whether in the shape of Constitutions, Statutes, or *Judicial judgments—that deprived any person of life, liberty or property*, or of the equal protection of the laws.' * * *." (Italics supplied.)

In *Huebschmann vs. Grand Co.*, 166 Md. 615; on pp. 620-621, it is said:

> "* * * the fact that the Appellee, which created the nuisance in the first place, will gain more by its continuance than the Appellants will by its abatement is no reason why it should be continued, * * *; for that *the right of the citizen to possess and enjoy property depends*, not upon its value as compared with other property, but *upon constitutional guarantees.*" (Italics supplied.)
>
> "* * * we know of no respectable authority for the principle that one may for its private gain appropriate his neighbor's property to improve his own because his neighbor's loss will be less than his gain."

In *Riden vs. P. B. & W. R. Co.*, 182 Md. 336; on pp. 339-340, it is said:

> "* * *, the *taking of* a man's *property for the private use of another*, even with just compensation, violates Art. 23 of the Maryland Declaration of Rights, which declares that no man ought to be deprived of his life, liberty, or *property* but by the law of the land. Likewise, *the taking of private property for private use* by authority of the State *is a violation of the due process clause* of the 14th Amendment to the Constitution of the United States." (Italics supplied.)

In *St. John, etc. vs. Gengor,* 121 N. J. Eq. 349; on p. 354, it is said:

> "* * * there is no principle known to our system which sanctions the involuntary transfer of one's property to another, for the private use and benefit of the latter, whether by general law or by special enactment."

In *Mayor, etc., of Baltimore vs. Brack,* 175 Md. 615; on page 624, the Court (in effect preserving unto Mr. Brack, the appellee, all of his constitutional rights, in respect to private property owned by him, to be used for a public purpose, under the 5th Amendment to the Constitution) said:

> "* * * as we have indicated, the City (of Baltimore) must meanwhile pay the appellee for the use of the easements, and because the duty is incumbent upon the City either to remove the utilities as prayed for in the bill of complaint, or to acquire them through condemnation or otherwise, within a reasonable time, under all the circumstances of the case; such a reasonable time to be limited to such period as is necessary for the expeditious conduct of final condemnation proceedings." Citing *Wisconsin vs. Illinois,* 278 U. S. 367, 399, 49 S. Ct. 163, 73 L. Ed. 426.

SPECIFICATION OF ERRORS.

Your Petitioners, respectfully, conclude:

1. That, the Appellate Court, below, has misconstrued the basic elements that give rise to a right of "easement by implication" upon adjoining land. The Maryland cases cited in the majority decision are not predicated upon facts comparable with the undisputed facts in the case at bar. No case can be found in the Maryland Reports to support the decision of the Appellate Court and its final judgment thereunder.

2. That, the undisputed facts in this case show, that the Appellate Court, below, has, in law, granted unto the Respondents a permanent, continuous, exclusive and totally dominant use of the strip of land of your Petitioners' "forever" which amounts to a fee in said land, and materially affects the Petitioners' entire property.

3. That, the action taken by the Appellate Court, below, is a final and conclusive affirmate act by the Judicial branch of the Government of the State of Maryland, which if not set aside by this Honorable Court, will forever deprive your Petitioners of any use whatsoever of the strip of their land, the soil thereof under the surface, and the air-space above, and shall otherwise interfere with their enjoyment of their entire property, in violation of Petitioners' rights guaranteed them, by Sect. 1, of the 14th Amendment to the Constitution of the United States.

STATEMENT OF UNDISPUTED FACTS.

(Excerpts from Testimony)

The following "parts of testimony" of Eugene B. Slear, the principal Respondent, the practical purchaser of the property, No. 801 N. Augusta Ave., Baltimore, Maryland, and of James Keelty, Jr., authorized officer of The James Keelty Realty Corporation, the builder and selier of the leasehold estate in said property, to the Respondents, under a written Contract of Sale, dated February 5, 1940, who thereafter orally agreed to, and did, at Respondents' request, make an alteration to an already completed garage then on the property covered by the contract, to be for the exclusive use and benefit of the Respondents, are extracted from pp. 7-24, of Appellants' Appendix annexed to their Appellate Brief, and from Appellees' Appendix annexed to their Appellate Brief, pp. 52-65. These show conclusively that on April 1, 1940, neither the Respondents

nor The James Keelty Realty Corporation, knowingly, or intentionally, contemplated or consented, that the rear-wall of the garage of Respondents' lot No. 801 should be definitely extended across the line and upon lot No. 803 then in possession of The James Keelty Realty Corporation, as to deliberately enlarge part of the width of lot No. 801 for the exclusive and permanent use and benefit of the Respondents. It is obvious that the extension over was accidental, unintentional, and unknown to every party in interest, until discovered by your Petitioners early in the year 1945. The following extracts, of testimony, are significant.

Mr. Slear, principal Respondent, testified on his own behalf, he is a "construction estimator", "is familiar with building construction" and "an engineer" (Applts. App. pp. 12-13). The evidence, "Deft's. Ex. No. 1" (Appellees' App. pp. 52-53), shows conclusively that on February 5, 1940, the Respondents signed a written Contract of Sale, to purchase from The James Keelty Realty Corporation, a leasehold interest in the property situated in Baltimore City "known as No. 801 *Augusta* Avenue" subject to an annual ground rent of $90.00. The contract was signed on the behalf of the seller, by James Keelty, Jr., authorized officer of The James Keelty Realty Corporation, to execute the contract.

The fully agreed purchase price, to be paid by the Slears, was $4,750., of which $500. thereof was paid at the signing of the contract, the remaining balance to be paid in subsequent installments.

Mr. Slear testified that at the time of the execution of the contract (February 5, 1940), the masonry walls of the house being so purchased, "were up between the first and second floors" (Applts. App. p. 7).

He further testified, that when he signed the contract "That garage they constructed was too small at 801." And when further asked "Did you know about the property line at that time?" he answered "No." And immediately thereafter, when asked, "But you did know, in order to accommodate your car, the north wall was moved over some inches, how many you do not know, on lot No. 803 N. Augusta Avenue?" he answered, "I knew it was moved, but I didn't know it was moved on the adjoining lot" (Applts. App. p. 9).

He further testified that the salesman called his "attention to the garage walls, as constructed, at the time wouldn't permit the entrance of any modern car at that time." and offered to correct the situation, and he would "take it up with Mr. Keelty, and the next thing I knew the wall was moved back," (ibid. p. 9). He also testified "the garage was lengthened", "the rear wall was moved back" (ibid. p. 7). "They extended it over. I didn't know it was extended over at the time" (ibid. p. 8). When asked the date the garage was altered, he testified "* * * I imagine it was around the last part of March or the first part of April (1940)." (ibid. p. 9).

He further testified, "The only part that was up when I bought the house was the walls." and that the end wall of the garage was moved northerly (Appellees' App. p. 62). And when asked "You have observed these downspouts? I am pointing at the downspout that serves the roof of 803?" * * * "Do you claim ownership under your theory—who owns that downspout, you or the Jankiewicz's?" and he answered "The Jankiewicz's" (ibid. p. 63).

And Mr. Slear, also when asked, "If the wall of 801 were moved back to the line, could you still get your car in there?" he answered "I could get the Plymouth in there."

And when further asked, "That is the only one you have now?" he answered, "Yes, sir" (ibid. p. 61). (Mr. Slear's Plymouth is a modern car; length 16' 4").

James Keelty, Jr., authorized officer of The James Keelty Realty Corporation, called as a witness for the Respondents, testified, "Those houses were built in 1929." (The testimony of the purchaser and the builder as his witness, of the condition of the house, No. 801 Augusta Avenue on February 5, 1940, is conflicting.)

Mr. Keelty, when asked, "Tell his Honor, just what you know about the alteration of that garage?", he answered, "These foundations for those eleven houses were originally constructed in 1929." * * * "And at that time the garages were constructed of a certain length, which I can't tell you now, but they were shorter than the present-day garage; but it was changed in 1940. It was made larger by us" (Applts. App. pp. 23-24).

He further testified the garage was changed because Mr. Slear wanted a larger garage, and when asked "Did you know when you made the larger garage, that you were encroaching on the lot next door?", he answered, "Well, at the time I don't think any houses were sold in that particular block and this was done under the supervision of our carpenter foreman," and further, "The garage was up, part of it was torn down in order to make the change" (Appellees' App. p. 65).

Lot No. 803 was sold and conveyed to Petitioners by deed dated May 23, 1941, and promptly recorded and the land conveyed is described by accurate metes and bounds. Thereafter lot No. 801 was conveyed to the Respondents by deed dated July 9, 1941, and promptly recorded and the land conveyed is described by accurate metes and bounds. Neither deed contains any mention whatsoever about a

garage on lot No. 801 to be conveyed; no references or reservations are made to any garage in any manner whatsoever in either deed.

And read into the Record of the testimony of the case, by counsel for your Petitioners, without objection, is the following: "* * * Mr. Keelty testified, in a pre-trial deposition, and I asked him: 'Q. When did you first learn; if at all, that there was a variance or controversy between 801 and 803 N. Augusta Avenue? A. To the best of my recollection it has been since my father died, which was on June 15, 1944. As far as I can recollect, I had no recollection of it before that'." (Applts. App. p. 23).

After the discovery, early in 1945, of the encroachment by the garage wall being over and upon lot No. 803 and demand thereafter made to remove the wall off of your Petitioners' premises, and after several conferences, between counsel for the respective parties, counsel for the Respondents in a letter to counsel for the Petitioners dated October 27, 1945, wrote as follows:

"* * *

> "I am going to suggest to Mr. Slear that he employ a surveyor to carefully mark the boundary line and then arrange with Mr. Keelty, or some other contractor, to remove that part of the garage which encroaches on the Jankiewicz lot." (Plffs. Ex. No. 19; Appellees App. p. 50).

Up to that time, and thereafter, there was no claim whatsoever that an alleged easement existed upon Petitioners' lot No. 803, to allegedly permit the wall remain on that lot. That idea was first suggested immediately before the trial of the case, held on November 1, 1946.

ARGUMENT.

There can be no exclusive use, possession or occupation by the Respondents, of the soil of your Petitioners' land without their consent, under any theory of "implied easement of appurtenance."

It is beyond dispute that your Petitioners are the owners by metes and bounds, of the entire lot of ground known as No. 803 N. Augusta Avenue, Baltimore, Maryland, subject to an annual ground rent. Within its outlines along and within its southerly side, there is a strip of land 8¾" to 10¾" in width and 13' in length, which is covered by the rear wall of a garage extending over from No. 801 adjoining on the south, and across the boundary line dividing lots Nos. 801 and 803. Lot No. 801 N. Augusta Avenue is owned by metes and bounds, by the Respondents. Both parties purchased their respective lots from The James Keelty Realty Corporation, as leaseholds.

The Petitioners' claim to the exclusive right and possession of their entire lot No. 803 was sustained in the Trial Court on November 1, 1946, and a judgment was entered in their favor for all of said lot as described in the amended Declaration. On Respondents' Appeal to the Court of Appeals of Maryland, the judgment of the Trial Court was reversed, the Appellate Court below, holding in substance that when the sellers of the house and lot No. 801 sold same to the Respondents on February 5, 1940, under a Contract of Sale, in writing, and thereafter, on April 1, 1940, solely for the accommodation of Respondents' automobile lengthened the garage that already was on lot No. 801 before the contract was signed and rebuilt that garage's rear wall, and completed the house, and delivered possession, on May 15, 1940, Respondents became the equitable owners of the property No. 801 including an ease-

ment granted by implication to use the land of No. 803 adjoining on its north on which the rear wall of the garage of No. 801 in its reconstruction had been built, on the theory that when the Petitioners purchased the adjoining property No. 803 on May 23, 1941, the Respondents were already in possession, of not only the whole of their own lot No. 801, but also of the adjoining strip of land, No. 803, of 8¾" to 10¾" by 13' long, and that the Respondents' possession thereof put Petitioners on notice of rights of the Respondents therein which the Appellate Court held could have been ascertained by inquiry. The Court, however, did not say what sort of inquiry Petitioners should have made. For authority the Court cited: DuVal vs. Wilmer, 88 Md. 66, 77; Burns vs. Gallagher, 62 Md. 473; Dineen vs. Corporation, 114 Md. 595. In respect thereto your Petitioners will make some comment subsequently.

The Court qualified the aforementioned conclusion, by offering a supposition, to the effect, that: If, "when Plaintiffs purchased, No. 803, no one had been occupying the adjoining property, No. 801, and the seller had held full legal and equitable ownership, [and at that time apparently the wall of No. 801 extended over and upon No. 803] that for the reasons above indicated, the Plaintiffs would have taken their property subject to the same easement. (Brackets supplied).

Petitioners do not observe that such a supposition presents a comparable case, for in this actual case, at bar, at the signing of the original contract there was no encroachment by the wall. The extension over the line had not been initiated for the use of the seller but was exclusively for the purchasers' use after the purchase of lot No. 801 under the contract.

The encroachment was not known nor obvious to either the seller, or the purchasers of either property, until discovery some four or five years later.

The Appellate Court further concluded: "That an owner may lawfully sell half of his garage or other building—or even a few inches—but in the latter case clear evidence of intent to do so might be necessary."

In the case at bar, the testimony preponderantly shows, *it was generally believed,* by the seller and each of the respective purchasers, that the garage, as of its present size, was entirely on lot No. 801 at the delivery of actual possession of that property to Respondents, on May 15, 1940. And at the sale of lot No. 803, to the Petitioners, on May 23, 1941, the encroachment was unknown to any one.

Elements that Determine an "Easement by Implication".

(*Authorities on the point*)

Restatement, Property, Sect. 450, (p. 2901), thus defines an easement:

> "An easement is an interest *in land in the possession of another* which, (a) entitles the owner of such easement to a *limited* use or enjoyment of the land in which the interest exists; * * *" (Italics supplied.)

Restatement, Property, Sect. 450, comment c, (p. 2903), says:

> "The *slight* degree of *control* which the owners of *easements* have as *compared with* the degree of *control* which *possessors of land have,* has led to the classification of easements as incorporeal interests while possessory interests are classed as corporeal interests." (Italics supplied.)

Restatement, Property, Sect. 471, comment e, (pp. 2964-2965), also says:

> "A conveyance which conveys the privilege of *exclusive use for all purposes of all or part of the conveyor's land constitutes an estate in the land.* * * * If the privilege of use created is *incompatible* with the retention of any privilege of use by the conveyor, *the conveyance will convey an estate rather than an easement.*" (Italics supplied.)

The *Illustration* in *Restatement*, of the principle so declared is (ib. pp. 2965-2966):

> "3. A conveys to B a lot together with *'the use forever of the basement'* under an adjoining lot, the surface of which is used as a passage-way and with 'also, rights of way in common with the (conveyor) over the first floor of said passage-way.' C, the successor in title to B, seeks to enjoin the use of the basement by D, the successor in title to A in the adjoining lot. D contends that he may use both the basement and the passage-way so long as he does not interfere with their use by C. Under the language quoted, *a decision that an estate in the basement is conveyed* and that D is, therefore, not entitled to use it, is proper." (Italics supplied.)

Restatement, Property, Servitudes, Sect. 476 (pp. 2977-2978), says:

> "In determining whether the circumstances under which a conveyance of land is made imply an easement the following factors are important:
>
> (a) whether the claimant is the conveyor or the conveyee,
>
> (b) the terms of the conveyance,
>
> (c) the consideration given for it,
>
> (d) whether the claim is made against a simultaneous conveyee,
>
> (e) the extent of necessity of the easement to the claimant,

(f) whether reciprocal benefits result to the conveyor and the conveyee,

(g) the manner in which the land was used prior to its conveyance, and

(h) the extent to which the manner of prior use was or might have been known to the parties."

Commenting on paragraphs (a), (b), (c), (e), (g) and (h), of the aforegoing, important factors, we observe that the evidence in this case affords the following determinations:

(a) the claimant is the conveyee,

(b) the terms of the conveyances to the respective parties, in this case, are identical in that neither deed contains any reference to the garage wall as extending from No. 801 over and upon No. 803 or intended to pass under either conveyance by any references or reservations in respect to said wall,

(c) the purchase money consideration given for the property No. 801 was agreed upon on February 5, 1940, before there was any idea or plan to enlarge the garage at No. 801 and extend its north wall, and no additional consideration was demanded, or given therefor. The ground rents as to the two lots are identical (each $90. per annum) and no adjustment or charge whatsoever was made to increase that of No. 801 or to reduce that of No. 803,

(e) the evidence does not contain any proof whatsoever that the continued use of the wall upon No. 803 is a "necessity" in favor of No. 801. In fact the evidence contains testimony on the part of the Respondent that if the garage were erected entirely within the outlines of his lot No. 801 he could still house his "Plymouth car" the only one he now has, in such a garage,

(g) the land, of No. 801, prior to its possession being given to Respondents on May 15, 1940, had never be-

fore been used by any one; it was new property, never used, before that date,

(h) testimony on the part of the Respondents shows that, at the time possession was given to them of No. 801 it was not known that there was an encroachment over from No. 801 and upon No. 803, and that was not known until it was ascertained by actual measurement and a survey made in March, 1945, on the part of your Petitioners, and thereafter brought to the attention of the Respondents. And subsequently, on October 27, 1945, Respondents' learned counsel concluded that the extension was an encroachment upon lot No. 803 and ought to be removed by the Respondents; and there is no evidence that in the purchase of small residence property, in Baltimore City, it is usual and customary to first have the property surveyed. The reverse is the rule; a survey is the exception.

Gale, on Easements, p. 23, says:

> *"There is no easement known to the law which gives exclusive and unrestricted use of a piece of land. A grant to the exclusive and unrestricted use of land beyond all question passes the ownership of that land.* Similarly, it seems that there can be no easement which could prevent the owner of the servient tenement from making ordinary use of his land, at least so far as not inconsistent with the proper use of an easement." (Italics supplied.)

Jones, on Easements, Sect. 14, p. 12, says:

> "A grant to exclusive use of land is not an easement for *such* a grant *excludes* the *grantor* and is in effect a grant of the soil itself." (Italics supplied.)

The learned author cites *Buszard vs. Capel,* B. & C. 141, in which it is said:

> "It is difficult to understand how the exclusive use could be demised and land not."

Jones, on Easements, Sect. 20, pp. 16-17, says:

> "Only incorporeal rights pass as appurtenant to land or under the description of appurtenances. Land cannot pass as appurtenant, nor can the actual and exclusive possession of land pass as appurtenant for such possession does not differ in effect from a title in fee. Lord Coke (Co. Litt. 121 b) states the rule saying: A thing corporeal cannot properly be appurtenant to a thing corporeal nor a thing incorporeal to a thing incorporeal."

It is thus shown, since in the early history of our Common Law, easements have always been classed as incorporeal hereditaments, as distinguished from rights of ownership of the land itself, termed corporeal hereditaments.

Frank, on Title (Maryland, 1912), p. 94, as respects "appurtenances", says:

> "The word 'appurtenances' is properly confined to things of an incorporeal character such as easements, and a conveyance of land 'together with the appurtenances and advantages thereto belonging or in any manner appurtaining' will not pass other land than that described, on the theory that it is appurtenant thereto, as the rule is frequently expressed 'land cannot be appurtenant to land'." Citing: 2 Tiffany, Real Prop., Sect. 293; Moss vs. Chappell, 126 Ga. 199; 11 L. R. A. (N. S.) 398, 407.

The following cases, are further authority, *that only the very land specifically described* by metes and bounds in the deed, passes under the respective conveyance, to the respective grantee, in this case.

In *Adams vs. Marshall,* 138 Mass. 228, 234 (a leading case), the Court held, that a grantee of land, the boundary line of which ran through a barn, acquired title only to

the part of the barn on the land conveyed by the description, and had no easement entitling him to the portion of the adjoining land; saying:

> "There is *no mention of the barn in the deed* to the defendant; *the premises are conveyed by metes and bounds.* Whatever title the defendant has in the barn has been acquired because the barn was so attached to the realty as to become a part of it, and therefore *that part of the barn* which was within the boundaries of the land conveyed to him pass to him by the deed as part of the premises conveyed. * * * there are no words in the deed whereby the grant can be extended beyond the boundaries of the land." (Italics supplied.)

In *Warren vs. Blake,* 54 Me. 276, the Court also refused to recognize that the grantee of the land on which almost all of a building stood, had any right to the portion of the building resting on part of other land which had been also owned by his grantor. The Court said, on p. 284:

> "It is familiar law that land cannot pass as appurtenant to land, although an easement may. *The question is, whether by any fair construction of the deed, it, by its own force, conveyed the fee in the strip.*" (Italics supplied.)

In *Griffith vs. Morrison,* 106 N. Y. 165, where the grantor of a lot failed to include in the description 5′ of a house which stood on the contiguous lot he also owned, the Court said:

> "I think the estate granted was a lot of land * * * and such buildings as were on the lot, but the estate did not extend to any portion of the building that was outside of or beyond such lot * * *."
>
> * * * * * *
>
> "The character of the easement claimed * * * in effect, does not differ from the claim of a fee to the 5′, but the right to occupy the space * * * requires in its

exercise, the actual and exclusive possession of that amount of land, although it was never conveyed * * *."

In *Whyte vs. Builders League*, 164 N. Y. 429, 433, where a frame building was on about 8′ of each of two continguous lots, it was said:

"As was said in the Morrison case, the character of the easement claimed does not differ in effect from a claim of a fee to the 8′. It requires the use of that amount of land belonging to the defendant. It would be intolerable to extend the doctrine applicable to party walls so far as to compel the owner of a lot, in the absence of an express grant or reservation to maintain or permit its maintenance by the adjoining owner * * *."

In *Strausburg vs. Sidwal Realty Co.*, 19 Northampton Rep. (Pa.), p. 268, it is said:

"Where an owner of land on which a building is erected, conveys a part of the land upon which the larger part of one building is erected, by a deed minutely describing the land conveyed by metes and bounds *without mentioning the buildings thereon*, no easement by implication arises in favor of the grantee of the larger part of the building, as to a bay-window, cornice, and fire-escape attached to the building and projecting over the line of division."

And on p. 270, it is said:

"The deed contains no conditions or reservations of any kind, and is wholly silent so far as express language is concerned, upon the matters in controversy raised in this case * * *."

In, Maryland, *Oliver vs. Hook*, 47 Md. 301, a leading case, on p. 307, it is said:

"*The deed is for a specific piece of land*, being parcel of a larger piece held and owned by the grantor, and described by metes and bounds. In such case, *in the*

absence of apt and express terms, no specific way outside the limits of the land conveyed, if not properly an existing easement, *will pass as appurtenant.* The only words in the deed to Minnick that could possibly be relied on to convey *the right of way* in question, are 'All and every the rights, privileges, appurtenances and advantages to the same belonging or in any wise appurtaining.' If there was a way belonging to the estate as a pre-existing easement, such a way would pass by force of these terms, or even without them."

See also: *Frank, on Title,* supra.

It should be observed that in the above cited case, the subject-matter involved was a "right of way," for mere transient use. Not a parcel of the adjoining land, for permanent and exclusive use.

Relationship of Lessor and Lessee.

It is, of course, obvious that as The James Keelty Realty Corporation, itself, was a mere lessee, entitled to possession for a term of years, in and upon No. 801 and No. 803, as separate units, each described in the original lease by respective metes and bounds, each subject to an annual ground rent of $90., payable unto James Keelty, Inc., lessor, a separate entity, as set forth in the lease of August 29, 1940, creating the estates for years constituting the interests affecting these two lots (Plffs. Ex. No. 3; Appellees' App. pp. 11-16). Therefore The James Keelty Realty Corporation, lessee, had no legal power to do anything as would permanently enlarge upon the terms of the demise under which they took possession, of the two lots, as to increase the size or area of lot No. 801, or to diminish the size or area of the adjoining lot No. 803, by implication, as should bring the title of those two adjoining properties into dispute or conflict.

In *Blight's Lessee vs. Rochester*, 20 U. S. (7 Wheaton) 535, opinion by Chief Justice Marshall; on p. 547, it is said:

> "The principle originates in the relation between lessor and lessee, and so far as respects them is well established, and ought to be maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is part of the very essence of the contract under which he claims that the permanent ownership of the lessor shall be acknowledged during the continuance of the lease and that possession be surrendered at its expiration. He cannot be allowed to controvert the title of his lessor, without disparaging his own, and he cannot set up the title of another without violating the contract by which he obtained and holds possession, and breaking that which he has pledged, and the obligation of which he is still continuing in full possession."

That principle is the established law in Maryland, and is set forth in the following cases:

Isaac vs. Clarke, 2 Gill (Md.) 1;
Funk vs. Kincaid, 5 Md. 404-409;
Elwood vs. Lannon, 27 Md. 200-207;
Goodsell vs. Lawson, 42 Md. 348-371;
Presstman vs. Silljacks, 52 Md. 647-656;
Tizer vs. Tizer, 162 Md. 489-494;
Maulsby vs. Scarborough, 179 Md. 67-71.

It must be affirmed that the strip of land of 8¾" to 10¾" wide, and 13' long, could not be, and was not, subtracted from lot No. 803 and added to No. 801, as a parcel. As a result the originally planned dimensions of each of the two lots and the platted areas of each, must remain unchanged. Respondents do not claim a grant of the strip, as a parcel.

The majority decision of the Court of Appeals of Maryland fully recognized that under the real facts of this case the herein Respondents could not be deemed to have taken legal title to the strip of land, and under inquiry, of lot No. 803, under any theory of implied grant of that strip to Respondents, as a parcel, so that proposition as to who holds the legal title to the strip is definitely set at rest. The Respondents are not making any claim to ownership of the strip of land, as a parcel; no mention of the garage of No. 801 is contained in either the deed to your Petitioners conveying No. 803, or in the deed to the Respondents conveying No. 801.

Respondents' Ownership of Lot No. 801, Dates from February 5, 1940.

Under the theory of equitable ownership, through operation of law, the Respondents, upon the signing of a Contract of Sale, on February 5, 1940, as vendees, became, *eo instante*, owners of all of the right, title, interest and estate in lot No. 801 of The James Keelty Realty Corporation, the vendor, which that vendor then equitably passed to the vendees; the vendor, however, retaining the possession, at the risk of the vendees, in trust as security for the subsequent payment of the full purchase price. This doctrine of law is announced in: *Brewer vs. Herbert*, 30 Md. 301; and in *Kinsey vs. Drury*, 146 Md. 227.

Thereupon, all of the vendor's estate in the land of lot No. 801 immediately passed to the vendees, at the vendees' risk; and at that time a garage, a completely built structure, was upon that lot and entirely within that lot's boundary lines. The Contract of Sale made the vendees land owners of said lot No. 801. After that, at said vendees' request, the garage was subsequently lengthened, and although the work was actually done by the vendor's work-

man to gratify the desire of the vendees, if, in the alteration of the end wall of the garage, it was accidentally or unknowingly extended across the boundary line and upon the adjoining lot, retained by the vendor, it was, at best, nothing more than a granting by the vendor of an implied temporary license to the vendees to use so much of that adjoining land as would support the wall built upon the strip of that lot, under the operation of a parol license, and this must be so, because in the creation of the lease of these two and other lots and the subsequent conveyancing of lot No. 803, on May 23, 1941, and the further subsequent conveyancing on July 9, 1941, of lot No. 801, The James Keelty Realty Corporation made no provision whatsoever, in either deed, that would permit the strip of land of No. 803 continue to be permanently occupied by the garage wall emerging from No. 801, which revoked the theretofore existing parol license, and brings the case clearly within the purview of the Maryland Rule of *Shipley vs. Fink*, 102 Md. 219, etc. (supra).

Consequently there can not be any tenable theory of "easement of appurtenance" upon the land of No. 803, by implication.

Maryland Statute Involved.

(Pertinent Part Applicable)

Art. 21, Sect. 1, of Code of Public General Laws of Maryland (1939 Ed.):

> "No estate of inheritance, or freehold, or any declaration or limitation of use, or any estate over seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged, and recorded as herein provided; * * *."

The Court of Appeals of Maryland, in construing the Statute, above set forth, in the following cases, held:

In *Mayor, etc. vs. Brack*, 175 Md. 615; that an oral permission given by a landowner, to lay large sewer and water pipes, underground, was an oral license, which terminated at the death of the licensor.

In *Shipley vs. Fink*, 102 Md. 219-226; that an oral permission given by a landowner to permit the extension of half a frame house, across the line, was an oral license, which expired at the death of the licensor.

In *Carter vs. Harlan*, 6 Md. 20; that a right to flood the land of another was an interest in the other's land that could pass only by a deed, acknowledged and recorded.

In *Hays vs. Richardson*, 1 G. & J. (Md.) 383-384; that a right to build a road and bridge on the land of another, could only be had by a deed, acknowledged and recorded.

In *Carter vs. Harlan*, supra, on page 25, *in appellees' brief therein*, it was argued:

> "If the right in this cause could be claimed under a parol license, permanent easements in land would be created in contravention of the common law, the statute of frauds, and our registry laws, for if such rights could originate in parol license, it is clear that the license would be irrevocable. * * * *The claim here being to flood the lands of Harlan for an indefinite period, or in perpetuity, under a parol agreement or license, is void.*" (Italics supplied.)

In the Court's opinion, on page 27, it is said:

> "When *Harris*, who was then the owner of the land, now belonging to the *plaintiffs*, disposed of and conveyed it away, such disposal and conveyance, *ipso facto*, by mere operation of law, amounted to a revocation of the license; and so likewise with all the subsequent sales of it, until the *plaintiffs* in this action became seized of it. To use the language of Chief Justice Parker, in the case of *Cook vs. Stearns*, 11 Mass. 536,

> "If the *defendant* had a license from the former owners of the *plaintiff's* close, to make the bank, dam and canal in their land, this extended only to the act done, so as to save him from their action of trespass for that particular act; but it did not carry with it any authority, at any future time to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it without any reservation, would of itself be a countermand of the license."

The references to "Harris" and "plaintiffs" and "defendant", respectively, in the above quotation, are comparable to "The James Keelty Realty Corporation" and "Petitioners" and "Respondents", respectively, in the case at bar. To the end that the bona fide sale and transfer of No. 803, by The James Keelty Realty Corporation, to the Petitioners, without any reservation in respect to the garage wall of No. 801, terminated the right of the Respondents to continue that wall over on lot No. 803.

In *Mayor etc. vs. Brack*, 175 Md. 615, supra, on p. 620 (referring directly to the case Shipley vs. Fink, 102 Md. 219, 221), the Court said:

> "The Court failed to find an enforceable agreement to convey the strip, and concluded that *there was nothing more than a parol license for the enjoyment of the easement in the land and the wall of the house against which the structure was built;* and such a license the Court found to be revocable, so that the removal of the structure could not be prevented by a Court of Equity." (Italics supplied.)

The facts above quoted, are identical and comparable to those in the case at bar, in that the Contract of Sale, dated February 5, 1940, between The James Keelty Realty Corporation, vendor, and the Respondents, vendees, cover-

ing Lot No. 801, contains no enforceable agreement between the parties, to compel the conveyance, by the vendor, of the strip of land of No. 803 involved in this case, to the vendees.

And continuing, in *Mayor etc. vs. Brack*, supra, on page 621, the Court cited *Houston vs. Laffee*, 46 N. H. 505, 507, from which Petitioners quote, as follows:

> "* * * the later decisions sustain the doctrine that the license is in all cases revocable, so far as it remains unexecuted, *or so far as any future enjoyment of the easement is concerned;* for to hold otherwise, would be giving to a parol license the force of a conveyance of a permanent easement in real estate, *and no such right or interest in real estate can be created by parol.*" (Italics supplied.)

And, further, on page 622, the Court said:

> "* * * *unrecorded grants of easements in land must give way to a grant of the fee*, and that apart from a prescriptive right, *an easement is an interest in land which cannot be created except in the mode and manner prescribed in the recording Statutes* of this State (of Maryland);" (Italics supplied.)

And on pp. 619-620, in referring to the conveyancing Statute of Maryland, (Art. 21, Sect. 1, Code of Pub. Gen. Laws), the Court said:

> "* * * it is definitely settled by this Article that no interest in land for a term exceeding seven years can be transferred except by deed duly executed and recorded."

Respondents as Mere Licensees.

(As between themselves and their Vendor)

In the Trial Court, and on appeal to the Appellate Court below, your Petitioners asserted that the theory of implied easement as was contended for by the Respondents, is not

tenable in this case. The cases relied on by the Respondents, some cited in the Appellate Court's majority opinion, do not support a theory of "easement by implication," of exclusive, continuous, and permanent use as to permit Respondents' wall, erroneously placed at the outset, to remain upon your Petitioners' adjoining strip of land, of No. 803, to be a major dominant thing, or superior in law, to Petitioners' land.

Petitioners' land, bona fide purchased, is specifically described by correct metes and bounds and conveyed by deed, acknowledged, and recorded. There is no rule of law as could make Petitioners' said land subordinate and minor, to the sole and exclusive use of the Respondents' wall, erroneously extended over. There was no compliance by the Respondents, or their grantor, with the conveyancing statute of Maryland, above quoted, as to give Respondents' wall a right upon your Petitioners' land.

Petitioners asserted, and still assert, that, at best, the Respondents' occupation of the strip, as between Respondents and The James Keelty Realty Corporation, was no more than a license, by implication, which as between those parties gave Respondents a good occupation during the interim that The James Keelty Realty Corporation retained ownership of No. 803, which license, however, terminated at the sale of the property No. 803 to your Petitioners, on May 23, 1941, without any provision or reservation in the deed for the future use of the strip of land to support the wall emerging from lot No. 801.

After notice given by your Petitioners to Respondents on June 18, 1945 to quit the premises, of No. 803 and failing to do so, the Respondents became trespassers. In support of such theory of license, Petitioners cited, and again cite: *Mayor etc. vs. Brack,* 175 Md. 615-622; *Shipley vs.*

Fink, 102 Md. 219-227; *Carter vs. Harlan*, 6 Md. 20; *Hays vs. Richardson*, 1 G. & J. (Md.) 383-384; all supra.

Additional State Court Decisions.

In *Wessels vs. Colebank*, 174 Ill. 618; on p. 622, it is said:

> "*An easement is an incorporeal hereditament* and consists of a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washb. Real Prop. c. 1, Sect. 3, p. 1. *It is always distinct from the occupation and enjoyment of the land itself.* It is a liberty, privilege, or advantage in land distinct from ownership, and rests upon grant or prescription. 1 Washb. Real Prop. c. 12, Sect. 2, p. 1." (Italics supplied.)

In *Slegel vs. Lauer*, 148 Pa. 236; on p. 240, it is said:

> "An easement is a liberty, privilege, or advantage which one may have in the lands of another *without profit.* * * * It may be merely negative, * * * and may be created by a covenant or agreement not to use the land in a certain way. * * * But *it cannot be an estate or interest in the land itself, or a right to use any part of it.*" (Italics supplied.)

In *Post vs. Pearsall*, 22 Wend. (N. Y.) 425, an alleged right to deposit manure on a small part of another's land was claimed as an easement. There the Court said, on pp. 437, 438:

> "What are these rights? * * * Who shall say that these rights if allowed to exist shall fall short of a continued use and therefore be an appropriation of the soil itself and instead of constituting an easement be equal to an absolute fee * * *. Now *can that which appropriates the whole use of the soil for an unlimited time be considered an incorporeal hereditament? Is it not as much a mark of title and exclusive enjoyment as the erection of a house?*

"* * * If the doctrine here contended for be allowed to prevail, it would take from the owner everything valuable in the soil; it would take the substance and leave to him the shadow, and the mere * * * right which is claimed to confer an easement * * * would be permitted to have such an effect as substantially to deprive the owner of the fee, in the land." (Italics supplied.)

In *Saxton vs. Mitchell,* 78 Pa. 479, a testator directed that his executors sell his real estate, however, reserving a portion thereof for the use of members of a Church upon which to hold their camp meetings. Such *meetings were only periodical* and then continued only *for from one to two weeks.* The question arose as to whether the testator had in effect granted the land to the Church or whether the Church merely had an easement therein. The Court held the latter, but said, significantly, on p. 483:

"They (members of the Church) acquired such rights as were reasonably necessary for the enjoyment and protection of their worship. It is true *a devise of the use forever is equivalent to a devise in fee.* Hence, *if the testator had given* to the members of the Church such *a use or occupation of the land* as would forever have given them *the continuous and exclusive possession thereof,* it *might, in law, have given them a fee.*" (Italics supplied.)

In *Beistel vs. Westmoreland Motor Car Company,* 91 Pa. Super. 343, a deed conveyed "the use forever of the basement under the passageway." As to the extent of the estate conveyed the Court said, on p. 349:

"*What do these facts signify?* We all agree that by the grant of the 'use forever' (Riggs vs. New Castle, 229 Pa. 490, 493; Landell vs. Hamilton, 175 Pa. 327), of the basement * * * the grantors intended to and did grant and convey * * * the use of the basement as

then constructed to the exclusion of all others. In Blauvelt vs. Water Co. 75 N. J. Eq. 351, Vice Chancellor Garrison, in construing a conveyance, 'together with the use of such portion of the land' * * *, said '* * * I give to the word 'use' as herein employed the meaning of entire exclusive complete or any other comprehensive word to express all the purposes to which the land can be put; in other words, I think the intention was to grant a fee, and that by the employment of the word 'use' the grantor intended to grant and convey the entire use, that is to say, *the entire dominion over the land;* under all the authorities where the intention employing the words 'use' is to indicate complete dominion, the word *is sufficient to carry the fee.*" (Italics supplied.)

In *Casey vs. Channing,* 43 Pa. Super. 31, it was argued that an easement claimed to have been created by implication entitling one landowner to the use of a privy on adjoining land, and was, contended to be in effect, the right of exclusive possession of a portion thereof. The Court, however, as to that contention, said on p. 39:

"* * *. It was not necessary to the proper and reasonable enjoyment of the easement, claimed by the plaintiff, that her possession of that portion of the building should be at all times exclusive and adverse to the real owner of the soil.

"Had she thus attempted to surcharge her easement and develop it into a title to the land itself, a remedy at law or in equity *would have been available to the owner to prevent the clandestine acquisition of her title.*" (Italics supplied.)

There is no Proof of Intent to build over the Line or of prior use by common Grantor.

The entire Record in the case, at bar, is totally lacking as to any affirmative proof whatsoever, on the part of the Respondents, that in the lengthening of the original gar-

age, it was planned or intended to extend the enlargement over the boundary line and upon the adjoining lot No. 803, for the distances enumerated in the aforegoing, particularly in view of the Respondent's testimony that his present Plymouth automobile (modern; 16′ 4″ in overall length) would fit in a garage built entirely within lot No. 801 (which is 20′ 6″ wide and allowing 16″ for front and back walls, would leave a net interior length of 19″ 2′, to house his automobile only 16′ 4″ in overall length).

In *Heffley vs. Lohr*, 149 Pa. Sup. 586, 591, the principle was expressed, thusly:

> "What determines the existence of an easement is the intention as *implied and manifested by the acts of the parties*, * * * and not their undisclosed understanding as to the purpose or effect of the deed."

In *Becker vs. Rittenhouse*, 297 Pa. 317, 325, it is said (quoting from 9 R. C. L. 757):

> "*Three* things are regarded as essential to create an easement by implication, on the severance of the unity of ownership in an estate: *first*, a separation of title; *second*, that *before the separation takes place, the use, which gives rise to the easement, shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and third*, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained." (Italics supplied.)

And the Court, quoting again from 9 R. C. L. 754, further said on pp. 325-326:

> "* * * The burden of proof rests with the person asserting it to show the existence of all facts necessary to create by implication an easement appurtenant to his estate."

In *Piccirilli vs. Adams,* 27 Northampton Rep. (Pa.) 84, 87, it is said:

> "Before an easement will be implied, it must be shown that the user, upon which the easement is based, was initiated during the unity of ownership by the common grantor, that a separation of title has been consummated, that the user during the unity of ownership of title was obvious, continuous, manifestly permanent and necessary for the beneficial enjoyment of the land granted or retained." Citing: *Becker vs. Rittenhouse,* 297 Pa. 317, 325; *Stein vs. Telephone Co.,* 301 Pa. 107; *Nauman vs. Tree Box Co.,* 280 Pa. 97; *Phillips vs. Phillips,* 48 Pa. 178.

Petitioners pause to say, that in the case, at bar, *the facts show that the user was not initiated by the common grantor* for its use, but the change was made for the sole future use and benefit of the Contract purchaser, of lot No. 801, to be enjoyed thereafter. *Mr. Slear did not know that the user went beyond the boundary line of his lot.* It was not obvious to him.

More Decisions, Federal and State Courts.

In *Scheide vs. Porstmann,* 66 Fed. S. 483, (Dist. Ct. of Md.; opinion by Chesnut, J., filed May 10, 1945), the Court said, on p. 487:

> "Counsel for the plaintiffs contend that the whole of the land should be considered as *appurtenant* to the house * * *. I have not been referred to any case * * * that further defines or applies the word *'appurtenant'* to this definition. *In the law of real estate it would be inapt ordinarily to speak of land as appurtenant to a house* because the legal conception of the word 'appurtenant' in this connection implies something that is minor, and only incidental to a major thing." (Italics supplied.)

And continuing, it is said:

"This term, both in common parlance and in legal acceptation, is used to signify something appurtaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says (Co. Litt. 121 b), a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule land cannot be appurtenant to land." *Harris vs. Elliott*, 35 U. S. (10 Peters) 25, 54.

See also: Humphrey vs. McKissock, 140 U. S. 304, 314; Bouvier's Law Dict.; 6 C. J. S. 133, 134, 136; 1 Tiffany L. & T. 816; 32 Amer. Jur. 163, 164.

In *Harris vs. Elliott*, 35 U. S. (10 Peters) 25, 54, supra (a frequently quoted case), the Supreme Court further said:

"In the case of Jackson vs. Hathaway, 15 Johns. 454, the court say it is impossible to protect the defendant on the ground that the adjoining road passed by deed, as an incident to the land professedly granted. A mere easement may, without express words, pass as an incident to the principal object of the grant; but *it would be absurd to allow the fee in one piece of land not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries.*"

"The answer, therefore, to this branch of the question, must be that *the soil and freehold of the street did not pass under and by virtue of the term 'appurtenances'.*" (Italics supplied.)

In *Humphreys vs. McKissock*, supra, 140 U. S. 304, on p. 314 it is said:

"* * * of two parcels of land one can never be appurtenant to the other, for although the possession of the one may add greatly to the benefit derived from the

other, it is not an incident of the other or essential to the possession of its title or use; one can be enjoyed independently of the other."

Paraphrasing what the Court said, in the above cited case, by comparison of the facts with those at bar, would be in substance, to wit:

> * * * that *the land covered by the end wall built on lot No. 803, whether existing at the time of the signing of the Contract of Sale of No. 801, on February 5, 1940, or erected afterwards,* on April 1, 1940, *will not pass as appurtenant to the property No. 801 sold previous to its existence.* A thing is appurtenant to something else only when it stands in the relation of a mere incident to a principal or major thing, and as a minor thing is necessarily connected with the use and enjoyment of the principal thing.

In *New Orleans Pac. Ry. vs. Parker,* 143 U. S. 42; it is said on p. 55:

> "The word *'appurtenance' as ordinarily defined,* is that *which belongs to or is connected with something else to which it is subordinate or less worthy,* and with which it passes as an incident, such as an easement or servitude to land: the tackle, apparel, rigging and furniture to a ship; a right of common to a pasture; or a barn, garden, or orchard to a house or messuage. In a strict legal sense it is said that land can never be appurtenant to land." Citing: *Jackson vs. Hathaway,* 15 Johns. 447, 454; *Leonard vs. White,* 7 Mass. 6; *Woodhull vs. Rosenthal,* 61 N. Y. 382. (Italics supplied.)

In *Donnell vs. Humphreys,* 1 Mont. 518; on p. 525 it is said:

> "A thing corporeal cannot properly be appurtenant to a thing corporeal nor a thing incorporeal to a thing incorporeal; so that land cannot be appurtenant to

land." Citing: *Harris vs. Elliott*, 35 U. S. (10 Peters) 54; *Leonard vs. White*, 6 Mass. 8; *Jackson vs. Hathaway*, 15 Johns. 447.

And the Court said further:

> "It follows that *things, in their nature equal, and of like character and grade*, can never be appurtenant to each other, for the common as well as the legal meaning of the word implies inferiority and dependence, so that *a water ditch could never become appurtenant to another ditch* of like character and pass as an incident thereto, for the same reason that *one farm will not pass as an appurtenance to another* (farm)."

And on p. 530, it is said:

> "It is important to observe the distinctions between what passes as an appurtenance and what as *part* and *parcel* of the subject matter. Things equal to their principal cannot pass as appurtenant to it. Things corporeal cannot pass as appurtenant to things corporeal, a ditch to a ditch, nor land to land."

In *Hervey vs. Inhabitants of Sandwich*, 256 Mass. 379; on page 384, it is said:

> "It is a general rule of construction that 'wherever land is occupied and improved by buildings or other structures designed for a particular purpose, which comprehends its practical use and enjoyment, it is aptly designated and conveyed by a term which describes the purpose to which it is thus appropriated.' * * * and the conveyance in such form passes by implication and comprehends the land under the structure and the land adjacent thereto so far as necessary to its use and commonly used with it *not as an appurtenance, but as a parcel.*" (Italics supplied.)

In *Tabor vs. Bradley*, 18 N. Y. 109; from its headnotes, it is observed:

> "The * * * Company conveyed to the defendant, by metes and bounds, *without any mention of a mill, dam*

or water privilege of any kind, certain land upon which he (defendant) had previously constructed a mill and a dam, which flowed other land of The * * * Company. *There being no evidence that the grantors had notice of the existence of the mill or dam when the deed was executed,* held *that it did not convey the right of flooding the land of the grantor.*" (Italics supplied.)

The last above-cited case, is comparable with the case, at bar, in that in Petitioners' case, when The James Keelty Realty Corporation put the Respondents in possession of No. 801, on May 15, 1940, the evidence does not show that said Realty Corporation, the vendor, or the Respondents, the vendees, then had knowledge of the existence of the garage wall, of No. 801 as being over and upon lot No. 803 of the vendor then being retained, and accordingly the vendor did not knowingly and intentionally and with consent, put the vendees in possession of the strip of land of No. 803 and the vendees did not knowingly enter into possession of said strip.

And also in the above-cited case, *Tabor vs. Bradley,* supra, in the Court's opinion, on pp. 111-112, it is said:

"The right to flow the lands of another * * * can only be created by grant."

In *Maryland,* and comparable to the immediately aforegoing quotation, the case of *Carter vs. Harlan,* 6 Md. 20, supra, held:

"The right to overflow another's land by mill-dam, is an interest in land which cannot pass by parol."

In *Union Falls Power Co. vs. Marinette Co.,* 238 Wis. 134; on p. 139, it is said:

"A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing

incorporeal. According to this rule, land cannot be appurtenant to land." *Harris vs. Elliott*, 35 U. S. (10 Peters) 25, 54.

And the Court further said:

"Plainly the dam and the dam-site cannot become an appurtenance to the mill."

"The mill is appurtenant to the dam-site, that is the land upon which the mill and dam in part at least is constructed. By a flowage right is not meant the right to build a wall around a piece of land and cover it with water, nor can such a right be described as a water right."

The immediately aforegoing is pertinently comparable to the facts in the case at bar, for that as the rule as above stated shows, *the strip of your Petitioners' land of No. 803, on which Respondents' garage-wall is built cannot be an appurtenance to the garage and the Respondents' adjoining land No. 801.*

In *Stein vs. Telephone Co.*, 301 Pa. 107; on p. 111, it is said:

"Riland (lessor of easterly lot and brick building thereon, to Stein, Appellant) had but the one lot west of the brick building, to wit: that upon which the shed stood, * * * hence the Center Street lot was never embraced therein. Had the parties intended to include the shed and lot on which it stood they could easily have so stated and have given Center Street as a western boundary. *Being excluded therefrom it did not pass as an appurtenance.* In fact, *as a general rule, one piece of land does not pass as appurtenant to another,* although an easement therein will." (Italics and parentheses supplied.)

The case, *Riefler vs. Wayne S. W. P. Co.*, 232 Pa. 282, cited by the Court of Appeals of Maryland in the majority

opinion would appear not on the point. A right reserved in the deed of a "right to occupy so much of the land as they may consider necessary for a reservoir" was held to be an easement", but that is one of the express conditions contained in a valid deed between the parties and was duly recorded in the manner required by law. The parties thereto expressly agreed to abide by all of the conditions contained in that conveyance. This, of course, is not relevant to facts as in the case at bar contended to be an easement by implication, the deeds in evidence in the Petitioners' case containing nothing to point to an alleged easement.

An Easement shall not be for Profit.

An important rule in respect to *an easement* is, that it *shall not be for profit in the soil.*

In *Littlefield vs. Maxwell,* 31 Me. 134, on p. 142 it is said:

> "* * * *a use of another's land* (the piling of one's cord-wood on the other's land, comparable with maintaining an extended garage wall on the other's land) *must be considered as a profitable one,* arising to those who exercise it. It is not a claim to carry anything away from the soil (such as water out of a spring or well, or light and air), but the direct and continual appropriation of it (the soil) *for the purposes of gain.* Indeed it appears to go beyond a mere incorporeal right, and in the full extent of its exercise to claim the entire dominion of the land, as to deprive the owner of any benefit from it." (Italics and matter in parentheses supplied.)

On page 143, it is said:

> "* * * *The claim is certainly one of an interest or profit in the soil,* and brings it within the rule that such a claim cannot be sustained by custom * * *." (Italics supplied.)

See also: *Slegel vs. Lauer,* 148 Pa. 236; p. 240; supra.

The Possession given Respondents of No. 801 on May 15, 1940, was not Constructive Notice of their being in Possession of the Strip of No. 803 they themselves not knowing of it.

Possession by Respondents, of the strip of land of No. 803, on and after May 15, 1940, was not constructive notice to your Petitioners.

In *Shipley vs. Fink,* 102 Md. 219, supra, on p. 228, it is said:

> "* * * The possession of a party whose rights are involved in a purchase is a sufficient information of his right to put the purchaser on inquiry into the nature of those rights and that failing to make it he is in equity visited with all of the plaintiff's rights. But this doctrine is only applicable to a case where the possession is under a claim of right or title to some estate in the land, which is established by proof and not where there is a mere easement under a parol license which is subject to revocation at the will of the licensor, and which, as declared in Carter vs. Harlan, supra, is in fact revoked by sale and conveyance, as in this case * * *."

The Respondents, of course, did not purchase or acquire any estate in the land of No. 803. Neither the Respondents nor The James Keelty Realty Corporation, on April 24, 1941, or prior thereto, or thereafter, until the year 1945, knew that at the time, the Petitioners, on May 23, 1941, consummated the purchase of No. 803, the wall of No. 801 encroached over the line. Had actual inquiry been made by Petitioners, of the Respondents the latter not knowing of the encroachment, could not have advised the Petitioners of the same.

A Pennsylvania case practically identical with the Case at Bar. On the same point it was decided exactly opposite to your Petitioners' case.

In Pennsylvania, *Clements vs. Sannuti*, 51 Atl. 2d, 697, decided March 24, 1947, and cited by your Petitioners in their (Appellees') Brief, in the Court of Appeals of Maryland, below, shows that the material facts therein are almost identical with the facts in the case at bar, excepting that therein the encroachment, by the garage wall across the boundary line and upon the alleged servient tenement (whose position as asserted is comparable with that of your Petitioners), is of a distance of 12½ feet. That entire garage was 27½ feet long and had been in use for many years. Whereas in Petitioners' case, at bar, the encroachment over the line upon the alleged servient lot is for a depth of 8¾" to 10¾", the entire garage being approximately 21' 4" overall length. In every other respect the facts are comparable, excepting again in that case, the encroachment was *actually known* to be on the alleged servient lot, when the latter lot was taken into possession. Whereas in the case at bar the evidence shows *the encroachment was not actually known when Respondents took possession.*

The trial of that case resulted in a decree in favor of the alleged dominant estate, impressing an easement upon the adjoining lot. On appeal, the Supreme Court of Pennsylvania, reversed the Trial Court, and ruled that no easement existed, and decreed that the garage's extension over the boundary line to be an encroachment. The Court said, on p. 698: "It is the traditionally established doctrine that there can be no easement, no incorporeal right, binding the servient tenement, the effect of which would be to deprive its owner of the right of use or possession thereof." It might

be said, in that case, the deeds to the respective parties, and the record title of the properties did not contain any references whatsoever to the garage on the alleged dominant property extending over on the alleged servient property.

In commenting on *Clements vs. Sannuti*, supra, the decision of the Court of Appeals of Maryland concluded that because the extension in that case was over the line 12½ feet it was not an easement on the adjoining lot; but that because, the encroachment in our case is over the line only 8¾" to 10¾" it was an easement. Hence it seems the matter of the lesser degree or depth of the encroachment determined the extension to be an "easement".

It is, therefore, apropos that your Petitioners should now cite to your Honors' attention a case decided by this Honorable Court, on May 1, 1946.

In *United States vs. Causby*, 66 Sup. Ct. 1062, 1067, the Court approved and cited *Butler vs. Frontier Telephone Co.*, 186 N. Y. 486, as to the principle of an encroachment by a telephone wire, the degree thereof being regarded as immaterial; the New York Court, said:

> "If the wire had been a huge cable several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts, standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house on the bridge, and the air above the surface, of the land would alone be disturbed."

Your Petitioners believe the above-cited case is conclusive that the encroachment by the wall, whether 8¾" to 10¾" or even 12½ feet across the line is of the same principle, but differs only in respect to degree, and is an encroachment.

Summary.

The encroachment by the garage-wall upon the strip of land affecting the two adjoining lots, Nos. 801 and 803, existed, although unknowingly, on and before May 23, 1941, and thereafter, on July 9, 1941. At all those times The James Keelty Realty Corporation, the builder of the structures on those two lots, owned the separate leasehold estates in each. It had contracted to sell its leasehold interest in No. 803 to Petitioners and consummated that sale, by deed, on May 23, 1941 without any reference whatsoever to the garage-wall of No. 801 being over the line and upon the soil of No. 803; and as respects No. 801 it consummated the sale of its leasehold interest therein, to Respondents on July 9, 1941, also by deed, without any reference whatsoever to the garage-wall extending across the line and upon No. 803. Had The James Keelty Realty Corporation, the common grantor, intended to give consent that the garage-wall of No. 801 should permanently extend across the line and upon the strip of land of No. 803, that could easily have been so provided for in each of the above stated deeds. But it did not give such consent; on the contrary each respective deed contained a covenant of warranty, by the aforementioned grantor, as follows:

> "And the said Grantor hereby covenants that it has not done or suffered to be done any act, matter or thing whatsoever to encumber the property hereby granted; that it will warrant specially the property granted; and that it will execute such further assurances of the same as may be requisite" (Plffs. Exs. Nos. 4 and 5; Appellees' App. pp. 18, 22.)

Reference to the garage-wall being excluded, by the common grantor, from each of the aforementioned deeds, the strip of land of No. 803 did not pass to Respondents as a parcel, nor as an appurtenance, as to lot No. 801 sold to the

Respondents; and, therefore, the judgment of the Appellate Court, below, ought to be reversed.

As Respects the Particular Encroachment by the Iron Railing.

Second Point in the Petition.

Without admitting an easement could be possible to support the garage wall over the division line and upon your Petitioners' adjoining lot, to provide the longer interior space for the accommodation of Respondents' automobile, the additional erection and maintenance of the iron railing fence on the top of the garage wall, extending over the boundary line on your Petitioners' property, for exterior purposes to increase the width of a porch erected on the top of the garage, is an additional burden upon your Petitioners' lot and constitutes a further encroachment. Such a second encroachment cannot be deemed to be a "necessity."

Under the subject of *"Misuser"*, in 9 R. C. L. Sect. 47, p. 790, the following is stated:

> "A principle which underlies the use of all easements is that the owner thereof cannot materially increase the burden of it upon the servient estate, nor impose a new and additional burden thereon." * * * "It may be said in general that if an easement is put to any use inconsistent with the purpose for which it was granted the grantee becomes a trespasser to the extent of the unauthorized use." * * * *"The right to an easement does not authorize the holder to take exclusive possession of land and if he does so the owner may eject him."*

This point was particularly raised, and brought to the attention of the Appellate Court, below, in Petitioners' Motion for a Reargument, but denied.

Without prolonging this text in respect to the Respondents having committed the second encroachment across the line, by the maintenance of the iron railing fence, to be observed on each of the photographs, introduced in evidence as Plffs. Ex. Nos. 20, 22, 23; Applts. App. pp. 15-16; 17-18; 19-20, your Petitioners submit the following cases, covering every point upon which they contend the Respondents are committing a second encroachment upon your Petitioners' property, as authorities to support a reversal of the judgment of the Court of Appeals of Maryland, to be reviewed.

Citing:

Weyler vs. Gibson, 110 Md. 636-652;
Greenwalt vs. McCardell, 178 Md. 132-136;
Louis Sachs etc vs. Ward, 182 Md. 385;
Watson vs. French, 112 Me. 371;
Burnham vs. Nevins, 144 Mass. 88;
Lott vs. Payne, 82 Miss. 218;
Sutton vs. Groll, 42 N. J. Eq. 213;
Ocean Pier etc. vs. Woolsey, 4 N. Y. Supp. 114;
Holland vs. Demarest, 129 N. Y. 676;
Grafton vs. Moir, 130 N. Y. 465;
Gibbons vs. Ebding, 70 Ohio St. 298;
Sizer vs. Quinlan, 82 Wis. 390;
9 R. C. L. Sect. 42, pp. 784, 785;
Ibid. Sect. 47, pp. 790;
Ibid. Sect. 53, pp. 796, 797.

CONCLUSION.

It is, respectfully, submitted that this case is one over which this Honorable Court should assume jurisdiction; and to that end the Writ of Certiorari may be issued to the Court of Appeals of Maryland, as prayed.

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